JOO KOON POW & ORS. v. REG.

[A. Cr. J. (Rigby J.) October 24, 1956]

[Penang — Criminal Appeal No. 17 of 1956]

Common Gaming Houses Ordinance, 1953 — Whether premises of a registered society are used as a common gaming house.

In this case the police raided the premises of a club and found 21 women and 3 men taking part in gaming on the premises. The learned Magistrate convicted these persons of gaming in a common gaming house, basing his decision on a finding that 18 of the persons were not members of the club. The evidence however showed that all the persons were members of the club. The persons convicted appealed.

Held: (1) the learned Magistrate had misdirected himself upon the facts and the law and was wrong in holding that the appellants had not rebutted the presumption under section 19 of the Common Gaming Houses Ordinance that the club in question was a common gaming house;

(2) if the learned Magistrate had properly directed himself he might well have come to the conclusion that the club was a genuine social club providing purely incidental facilities for its members to game, should they be so minded to do.

Cases referred to :—

(1) *R. v. Fong Chong Cheng* (1930) S.S.L.R. 139.

(2) *R. v. Singapore British Malay Football Club* (1934) M.L.J. 3.

(3) *Tah Kah Joo v. R.* (1949) M.L.J. 250.

MAGISTRATE'S CRIMINAL APPEAL.

Lim Kean Siew for the appellants.

F. G. Cooke (Federal Counsel) for the respondent.

Rigby J. : — The 24 appellants in this case were convicted by the learned Magistrate of gaming in a common gaming house contrary to the provisions of section 6(1) of the Common Gaming Houses Ordinance (No. 26 of 1953). Upon conviction each of them was fined the sum of $25.

The particulars of the charge preferred against them were that they, on the 11th January, 1956, at 9.45 p.m., did gamble, to wit, a game of "Peh Bin" in a common gaming house, namely. "The Dondang Sayang Club", No. 217, Hutton Lane, Penang.

At the conclusion of the hearing I allowed the appeal, set aside the convictions and sentences and stated that I would give my reasons therefor at a later date. I now proceed to do so.

The brief facts of the case were that on the day and at the time in question a party of Police, acting on information received, raided the premises of "The Dondang Sayang Club". In the back room on the first floor of the premises they found the appellants, 21 women and 3 men. In the room was a large oblong table, on which were dice, poker chips and instruments for gaming. The appellants were searched and money and/or poker chips found in the possession of most of them. It is manifest that gaming was, in fact, in progress at the time of the Police raid. Despite the objection taken by Mr. Lim Kean Siew, Counsel for the appellants there was, I think, sufficient evidence before the learned Magistrate that the premises were properly entered by a Senior Police Officer under the provisions of section 18(b) of the Ordinance and that the presumptions under section 19 that the place was a common gaming house and under section 6(2) that the persons found therein were gaming accordingly arose.

The substantial ground of the appeal — and, indeed, the ground upon which the appeal succeeded — was that the learned Magistrate seriously misdirected himself upon the facts of the case and, as a result, misdirected himself upon the law.

Now the law in regard to gaming was set out in the Singapore case of *Rex v. Fong Chong Cheng & Ors.*[1]. That case has been repeatedly cited with approval over the passage of years and is, as far as I am aware, still the leading case on the subject. In the course of his judgment in that case Stevens J. stated :—

"It has first to be observed that in this Colony it is not illegal to play games of chance for money. But it is illegal to keep a common gaming house or to game in it, and a common gaming house is either a place to which the general public are able to resort for the purpose of gaming, or a place which, though barred to the public, is kept or used by the owners or occupiers primarily for the purpose of gaming. I say 'primarily' because I think it is clear that a place does not become a common gaming house merely because gaming habitually occurs in it. A private residence is not a common gaming house because the owner makes a practice of inviting his friends to it to gamble. Nor in my opinion do the premises of an ordinary social club become a common gaming house merely because the club provides facilities for its members to gamble, and some of them habitually use the premises for that purpose.

If that were so, no club whose primary object is social intercourse, or sport of any description, would be within the law if it habitually permitted any of its members to gamble on its premises and provided facilities for that purpose. In my opinion the mischief which the law is designed to prevent is the encouragement of gambling by the use of premises either for public gambling, or for the special purpose of a gambling saloon.

Notwithstanding this, the law has placed in the hands of the Crown a very powerful weapon to assist it in the suppression of illegal gambling. That weapon is Section 14 of the Common Gaming Houses Ordinance. (Section 19 of the present Ordinance). The effect of the section is that it places on any person whose premises are entered under the Ordinance, and found to contain instruments of gaming, the burden of proving that those premises are not a common gaming house within the meaning of the law.

Now it is clear that the section breaks in upon the general rule that a person accused of an offence is presumed to be innocent until his guilt is established by the evidence of the prosecution.

It places on him the burden of proving his innocence, as soon as certain facts have been established which draw some suspicion upon him.

It is clear, therefore, that any evidence given to rebut the presumption merits the careful consideration of the Court, and ought not to be lightly disregarded."

The learned Magistrate in this case, having referred to the above case and quoted part of the judgment as set out above, then went on to say :—

"In the present case the defence have not rebutted the presumption under Section 19, or cast any doubt on the prosecution case that the Club in question was a common gaming house.

Although in name the premises in question were a club house, but, in fact, they were a place used or kept for gaming to which the public had access."

He then stated that 18 of the appellants were not members of the Club; that they had no legitimate business on the premises and, therefore, the considerations stated in the *Fong Chong Cheng*[1] case, and relied upon by the defence, had no application. That was a clear misdirection of fact. There was evidence that the Club, founded in 1954, was properly constituted and registered and there was the evidence of Deputy Superintendent of Police Tan Chin Teik, who had taken part in the raid, that he had checked the Register of Members and found that all the appellants were, in fact, members of the Club. The result of misdirecting himself on the facts was, of course, that the learned Magistrate consequently misdirected himself on the law in that he concluded that this was a simple common gaming house to which members of the public had access. On the facts, it is apparent that it was a properly registered club and that the persons found gaming therein were all members of the Club. What he, therefore, then had to consider was whether this was primarily a genuine social club in which gaming went on merely as an incidental for the benefit and enjoyment of some of the members or whether it was in reality primarily a gaming house, thinly disguised as a club. In the case of *Rex v. Singapore British Malay Football Club*[2] Gerahty J., after stating the definition of a common gaming house as contained in section 2 of the Ordinance, went on to say :—

"On the true construction of this definition, it follows that members of a club not being a class of the public, the premises of a social club used by them do not become a 'common gaming house' within the first part of the definition 'merely because the club provides facilities for its members to gamble and some of them habitually use the premises for that purpose' (per Stevens J. in Rex v. Fong Chong Cheng and others), but such premises do become a 'common gaming house' within the second part of that definition if they are used for habitual gaming, the test being whether such premises are primarily kept or used for the purpose of gaming. Notwithstanding then that the avowed object of a club is to provide social amenities to its members, if, in fact, the primary object of that club is, or has become, gaming, and its premises are kept or used primarily for that purpose, then such a club is a 'common gaming house' within the meaning of and subject to the provisions of the Ordinance."

There were, no doubt, circumstances in this case which might have warranted the Magistrate taking the view that the Club, though purporting primarily to be a social club, was in reality simply a place where persons gathered together on premises ostensibly described as a club simply to cloak its primary purpose of existing for the purposes of gaming. On the other hand, there was a substantial body of evidence that, as the name of the Club signifies, and as the printed Rules of the Club state, this was a genuine musical club founded and promoted "to foster and encourage music among its members". The Club premises were immediately opposite a police station and there was the evidence of a Police officer that he used to hear the strains of Chinese and Malay songs coming therefrom. There was also evidence that musical performances had been given by the Club for charity and that the Club premises had been visited by distinguished personages who had allegedly enjoyed the music they heard therein. In the case of *Tah Kah Joo v. Rex*[3] Murray-Aynsley C.J. said :—

"To find that a place is kept for habitual gaming I think that one should consider its activities for a considerable period. If during that period substantial activities other than gaming are carried on I do not consider that the place can be considered to be kept for habitual gaming."

In the course of his judgment in *Fong Chong Cheng*[1] case Stevens J. said at page 148 :—

"It would be a most lamentable thing if the administration of our law were to give rise to the idea that indulgence in games of chance for money stakes, a common social amusement, notoriously practised by all classes of the community, becomes penal if practised by a Chinese night club. The real question in issue was whether the premises raided on this occasion were devoted exclusively to gambling or to general social purposes among which games of chance were included: . . .'

I would respectfully associate myself with those words. As I have said, there was in this case considerable evidence upon which the learned Magistrate, if he had properly directed himself upon the facts and the law in relation thereto, might well have come to the conclusion that this was a genuine social club providing purely incidental facilities for its members to game, should they be so minded to do, and that the presumption raised under section 19 of the Ordinance was accordingly rebutted. I was certainly unable to come to the conclusion that if the learned Magistrate had properly directed himself on the facts and on the law he would have recorded a conviction in this case.

For these reasons I accordingly allowed the appeal, set aside the convictions and sentences and directed that the exhibits produced in this case be returned to their respective owners.

Appeal allowed.